Supreme Court, U.S.
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No. 80-39

In the Supreme Court of the United States

OCTOBER TERM, 19____

JAMES T. VOLZ,
Petitioner,

VERSUS

UNITED STATES DEPARTMENT
OF JUSTICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DUANE MILLER
3609 N.W. 70th
Oklahoma City, Oklahoma 73116
Tele. (405) 843-7365

KENNETH W. TURNER
Hightower Building
Oklahoma City, Oklahoma 73102
Tele. (405) 236-1646

Attorneys for Petitioner

July, 1980

QUESTIONS PRESENTED

A. Whether subsection (k) (5) of the Privacy Act of 1974, 5 U.S.C., section 552a, exempts from disclosure those portions of a document containing information obtained under a promise of confidentiality when the source of the information is known but the specific confidential information itself is not known to the party seeking disclosure.

B. Whether the Petitioner has "substantially prevailed" in this matter to allow for the payment of attorney fees and costs as provided in 5 U.S.C., section 552a (g) (3) (B).

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1. This petition is seeking relief from a final judgment of the United States Court of Appeals, Tenth Circuit, James T. Volz, plaintiff-appellee *v.* United States Department of Justice, defendant-appellant, No. 78-1748 (not yet reported), which reversed the decision of the United States District Court for the Western District of Oklahoma (D.C. Case No. CIV 77-0635-E).

2. The judgment sought to be reviewed, is a judgment of the United States Court of Appeals, Tenth Circuit, dated 14 April, 1980.

3. There was no Application or Order for Rehearing filed in this case.

4. Jurisdiction to hear this matter by Writ of Certiorari is conferred upon The Supreme Court of the United States by 28 U.S.C., section 1254(i).

5. Two questions are presented for review.

[See first page inside front cover.]

6. The Privacy Act of 1974, 5 U.S.C., section 552a and specifically subsection (k)(5) provides:

> "Specific Exemptions. — The head of any agency may promulgate rules, in accordance with the requirements (including General Notice) of sections 553(b)(1), (2) and (3), (c) and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is—
>
> "(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under or implied promise that the identity of the source would be held in confidence; . . ."

5 U.S.C., section 552a (g)(3)(B), provides:

> "The Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed."

7. In May of 1976, James T. Volz, petitioner, acting in his official capacity as a Special Agent with the F.B.I., conducted an investigation authorized by his superiors and so acting became aware of a possible state law violation. Volz furnished this information to the proper state authori-

ties and then, on a very limited basis, assisted the state authorities with their investigation of the state law violation.

On the 12th of August, 1976, Volz was officially disciplined by the F.B.I., for assisting the local authorities in the investigation of the state law violation. Volz was suspended from duty without pay for five (5) days and placed on probation. This disciplinary action was based on the findings of an investigation conducted by the F.B.I. All records of this investigation were made a part of Volz's F.B.I. personnel file.

This disciplinary action was taken without Volz being aware of the exact accusations against him. To now defend himself against these accusations, Volz seeks to discover from his personnel file what his accusers have alleged his improper actions were so he can properly respond to them.

On the 26th day of August, 1976, Volz requested, in writing, that his F.B.I. personnel file be made available to him for review and copying as provided in 5 U.S.C., section 552a (d)(1).

On the 3rd of September, 1976, the F.B.I. responded to Volz's request by making available to Volz a portion of his personnel file. The F.B.I. had made deletions from each of these documents and advised Volz that other documents were being withheld in their entirety.

On the 20th of September, 1976, Volz appealed in writing the decision made by the F.B.I. on 3 September, 1976.

On the 27th day of April, 1977, the F.B.I. responded to Volz's appeal by releasing additional portions of his per-

sonnel file and again refused to disclose the contents of his entire file.

On the 18th of May, 1977, the F.B.I. released still other additional material from Volz's personnel file and again refused to disclose the contents of the entire file.

On the 30th day of June, 1977, Volz brought this action in the United States District Court for the Western District of Oklahoma.

On the 12th day of January, 1978, the F.B.I. again released other additional materials from Volz's personnel file and again refused to disclose the contents of the entire file.

With the release of the materials on the 12th of January, 1978, the F.B.I. acknowledged they had released to Volz all the documents in his personnel file, with the exception of two paragraphs, which were deleted from a written report of an F.B.I. interview with a man the F.B.I. specifically identified as Herman Finley Socrider, Jr., Attorney-at-Law, Suite 1008 Midsouth Towers, Travis Street, Shreveport, Louisiana.

The F.B.I. further acknowledged that the information deleted in the two paragraphs was information which Socrider had received from a person in his law firm, who received the information from a third person.

There has been no showing by the Government that the F.B.I. made a promise of confidentiality to the third person or to the member of Socrider's law firm who furnished the information to Socrider.

In *Neimetz* v. *U.S. Dept. of Treasury*, 446 F.Supp. 102 (1978), the Court here held there must be a finding of a promise of confidentiality to each source sought to be withheld.

There has been no such finding in this case.

The F.B.I. gave as its reason not to release these two paragraphs the fact that Socrider has asked for the confidentiality protection provided by 5 U.S.C., section 552a (k) (5).

The action in the District Court was brought pursuant to 5 U.S.C., section 552a (g) (1) (B) which specifically confers jurisdiction in this type case on the United States District Courts.

The action in the District Court was limited to the two questions presented for review in this Petition.

A reading of 5 U.S.C., section 552a (k) (5) clearly reveals that information in Volz's F.B.I. personnel file could be withheld from him, but only if disclosure of such material would reveal the identity of the source of such information.

Here, the F.B.I. has advised Volz, that the source of the information he seeks is one Herman Finley Socrider, Jr., Attorney-at-Law, Suite 1008 Midsouth Towers, Travis Street, Shreveport, Louisiana.

The information Socrider gave to the F.B.I. is exempt from disclosure only to the extent that the disclosure would identify Socrider as the source of the information. Socrider has been identified as the source of the F.B.I.'s information, so certainly the 552a (k) (5) exemption from disclosure would not be applicable in this situation.

The District Court ruled that the Government's reliance on the 5 U.S.C., section 552a (k) (5) exemption was misplaced. The identity of the source of the F.B.I.'s information (Socrider) had been made known by the F.B.I. to Volz, so the Government could not now withhold this information under the guise of keeping confidential the F.B.I.'s source of this information.

Doubts as to the meaning of exempting provisions should, in clear policy of the Freedom of Information Act, be resolved in favor of disclosure. *Hawkes* v. *Internal Revenue Service,* 467 F.2d 787 (C.A. Tenn. 1972); *Sears, Roebuck & Co.* v. *General Service Administration,* 384 F. Supp. 996 (DC D.C. 1974).

The Freedom of Information Act exemptions are to be narrowly construed in accordance with the legislative purpose of Congress that disclosure rather than secrecy is the dominant objective of the Act. *Dept. of the Air Force* v. *Rose,* 425 U.S. at 360-361, 96 S.Ct. 1592.

In *Neimetz* v. *Dept. of Treasury,* supra, the Court in a similar fact situation, where the action was brought under 552a to get information the Secret Service acquired during employment background investigation, and the Government claimed a 552a (k) (5) exemption, the Court held:

> "It is clear on the face of the statute that only information which would identify the source of confidential information may be exempt by agency reguation. Thus, the Government's argument that all information received under a promise of confidentiality is exempt must be rejected at the outset. To the extent Section 552a (k) (5) applies, it exempts only information which would reveal the identity of the source."

Beginning in 1976, Volz administratively attempted to gain access to his personnel file. Over the next two-year period, on four separate occasions the F.B.I. released to Volz, bits and pieces of his personnel file. The last documents released to Volz was after the bringing of this action in the District Courts.

The Courts have held in a number of cases, *Nationwide Building Maintenance, Inc.* v. *Sampson,* 559 F.2d 704 (D.C. Cir. 1977); *Chamberlain* v. *Kurtz,* 589 F.2d 827 (5th Cir. 1979); *Polynesian Cultural Center, Inc.* v. *N.L.R.B.,* 600 F.2d 1327 (9th Cir. 1979), that the trial courts are to consider and weigh a number of factors in awarding attorney's fees to "substantially prevailing parties." These include:

a. The benefit which the public might derive from the case.
b. The nature of the interest of the plaintiff in the materials sought.
c. The reasonableness of the agency's withholding of the materials.
d. The pecuniary benefit and commercial interest of the plaintiff in the materials sought.
e. The necessity of and the causative effect of the filing of suit to obtain the materials.
f. Any other factor which might effectuate the legislative interest to maximize public access to government information and to facilitate public access to enforce statutory rights.

It would appear that Petitioner would qualify under each of these factors and should be entitled to have his attorney fees and costs paid as provided by law.

8. The Tenth Circuit Court of Appeals in ruling on the questions before it, ruled in opposition of all other courts who have ruled on this matter and in so ruling gave meaning to sections of the Federal Statutes which are diametrically opposed to the plain reading and understanding of these statutes.

This provision of the Privacy Act had not previously been ruled upon by this Court or by any other Court of Appeals.

The Court of Appeals here has decided an important question of federal law which had not been, but should be, settled by this Court.

Respectfully submitted,

DUANE MILLER
3609 N.W. 70th
Oklahoma City, Oklahoma 73116
Tele. (405) 843-7365

KENNETH W. TURNER
Hightower Building
Oklahoma City, Oklahoma 73102
Tele. (405) 236-1646

Attorneys for Petitioner

July, 1980

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of July, 1980, I have served three copies of the foregoing Petition for Writ of Certiorari upon each of the counsel for Respondent, by causing copies to be mailed, proper postage prepaid, to:

Barbara Allen Babcock
Assistant Attorney General
Department of Justice
Washington, D.C. 20530

Leonard Schaitman
Attorney, Appellate Staff
Civil Division
Department of Justice
Washington, D.C. 20530

The Solicitor General
Department of Justice
Washington, D.C. 20530

Terrance Jackson
Attorney, Appellate Staff
Civil Division
Department of Justice
Washington, D.C. 20530

Larry Patton
United States Attorney
Federal Court House
Oklahoma City, Oklahoma 73102

Copy of Opinion and Judgment of Court of Appeals and Opinion and Order of Trial Court attached.

DUANE MILLER

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JAMES T. VOLZ Plaintiff-Appellee	)	
v.	)	No. 78-1748
UNITED STATES DEPARTMENT OF JUSTICE Defendant-Appellant	)	

Barrett, Doyle and McKay, Circuit Judges.

Filed 14 April, 1980.

The Privacy Act of 1974 generally permits an individual to obtain access to agency records concerning him. 5 U.S.C., section 552a (d) (1). This case requires us to construe an exception contained in section 552a(k) (5) which exempts from disclosure

> investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

Appellee is a special agent for the Federal Bureau of Investigation. Beginning in 1976, the Bureau conducted a disciplinary investigation after which appellee was briefly suspended. During the course of the investigation, the FBI interviewed a lawyer named Socrider and recorded the information obtained from him in a three-page memorandum.

Socrider provided the information under an express promise of confidentiality. Eventually, in the face of litigation by appellee, the FBI released all of its information relating to the disciplinary investigation except the Socrider memorandum. Upon request, Socrider released the agency from its promise of confidentiality as to all of the information contained in the report except for two paragraphs. The agency then expunged the two confidential paragraphs and gave the report to the appellee. The trial court ordered the release of those two paragraphs as well. The government appeals.

The question before us is whether subsection (k)(5) exempts from disclosure those portions of a document containing information obtained under a proper promise of confidentiality when the source of the information is known but the specific confidential information itself is not known to the party seeking disclosure.[1] We find that disclosure under these circumstances is contrary to both the language and purposes of the exemption.

It is clear that the primary purposes of the exemption are to protect the privacy of confidential informants and facilitate governmental access to investigatory material which would not be made available absent a promise of confidentiality. *Cf. Scherer* v. *Kelly,* 584 F.2d 170, 176 (7th Cir. 1978), *cert. denied,* 440 U.S. 964 (1979); *Charlotte-Mecklenburg Hospital Authority* v. *Perry,* 571 F.2d 195, 203 (4th Cir. 1978); *National Parks & Conservation Association* v. *Morton,* 498 F.2d 765, 767-71 (D.C. Cir. 1974). These purposes would not be realized if disclosure could be compelled merely because the one seeking disclosure is

[1] This is not a situation where the government refuses to disclose the source of confidential information which is relied upon by the agency in defense of a suit brought by the employee to contest the agency's disciplinary action. In such a situation the agency might be required to reveal its confidential sources or drop the disciplinary action. *See* 120 Cong. Rec. 40406 (1974) (remarks of Sen. Ervin). However, we need not resolve this issue in this case.

aware that the source has given information of some sort to the agency. Not only the fact that an individual has talked to the agency but also the information thus obtained is protected from disclosure.

The trial court's ruling fails to recognize the inextricable connection between the source and the substance of a confidential disclosure. Socrider obtained a lawful promise of confidentiality for the fact that he was the source of certain substantive information. That the information contained in the two confidential paragraphs was a part of a broader body of information which has been released does not alter the result. Subsection (k)(5) protects the confidentiality of any substantive information provided by Socrider insofar as disclosure would reveal that he was the agency's source for that information.

In this case the FBI went to great lengths to obtain permission to release the information contained in the three-page document. It was not required to do so. Its successful attempt to obtain release of all but a tiny fraction of the memorandum was in keeping with the spirit of the Act. Any construction other than that which we give the Act would discourage such voluntary disclosures. It would also discourage cooperation by confidential sources and undermine the Act's attempt to encourage persons otherwise unwilling to reveal relevant information to the government.

In addition to ordering the release of information, the trial court granted attorney's fees and costs. Such an award is appropriate only if "the complainant has substantially prevailed" in his action. 5 U.S.C., section 552a (g)(3)(B). Although some information was released after the suit was filed, we have concluded that appellee has not "substantially prevailed" and the award of fees and costs must be reversed.

REVERSED.

[APPENDIX]

[Caption Omitted in Printing]

Filed 18 April, 1980

Doyle, Circuit Judge, concurring

I concur in the conclusion that the portions of the documents released to the appellee which were deleted are exempt from disclosure under the provisions of the Privacy Act of 1974, 5 U.S.C., section 552a(k)(5).

I disagree with the majority's summary reversal of the award of attorney's fees and costs. This is based on the conclusion that the appellee had not "substantially prevailed."

There is a public purpose for the Congressional inclusion of an allowance of attorney's fees under the Act, 5 U.S.C., section 552a(g)(3)(B), and although the Act is relatively recent, there is already ample authority requiring the trial courts to consider and weigh a number of factors in awarding attorney's fees to "substantially prevailing" parties. These include:

a. The benefit which the public might derive from the case.

b. The nature of the interest of the plaintiff in the materials sought.

c. The reasonableness of the agency's withholding of the materials.

d. The pecuniary benefit and commercial interest of the plaintiff in the materials sought.

e. The necessity of and causative effect of the filing of suit to obtain the materials.

f. Any other relevant factors which might effectuate the legislative intent to maximize public access to government information and to facilitate public access to the courts to enforce statutory rights.

Nationwide Building Maintenance, Inc. v. *Sampson*, 559 F.2d 704 (D.C. Cir. 1977); *Chamberlain* v. *Kurtz*, 589 F.2d 827 (5th Cir. 1979); *Polynesian Cultural Center, Inc.* v. *N.L.R.B.*, 600 F.2d 1327 (9th Cir. 1979).

Our decision is rendered without regard to the governing criteria. I would prefer to approve the modest award in the interests of promoting the public interest.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

JAMES T. VOLZ Plaintiff	)	
v.	)	No. Civ-77-0635-E
UNITED STATES DEPARTMENT OF JUSTICE Defendant	)	

Luther B. Eubanks, United States District Judge

Filed June 5, 1978

MEMORANDUM OPINION AND ORDER

Plaintiff, an agent of the Federal Bureau of Investigation, seeks, pursuant to the Privacy Act of 1974, 5 U.S.C. 552a, certain records held by the Federal Bureau of Investigation in the Western District of Oklahoma.

Defendant's motion to dismiss or for summary judgment was denied by Order of this Court dated March 3,

1978. At pretrial conference on March 31, 1978, the parties, after agreeing that the only issue in the case was one of law, were ordered to submit supplemental briefs. Defendant then filed a supplemental brief seeking summary judgment and plaintiff has responded.

The sole issue for determination is whether two paragraphs of a memorandum in defendant's file on plaintiff are exempted from disclosure by 5 U.S.C. 552a(k)(5), which reads in pertinent part:

> "(k) Specific exemptions . . .
>
> "(5) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence."

The contested material purportedly reports an F.B.I. interview with a Herman Socrider. The interview occurred as part of an investigation of plaintiff for alleged misconduct in involving himself in a state investigation. Socrider released the FBI from its pledge of confidentiality as to the contents of the interview except for the two paragraphs, the information for which Socrider claimed to have been obtained from another individual by Socrider's law firm.

Defendant's reliance on 552a(k)(5) is misplaced. That section speaks only to material the disclosure of which would reveal the identity of an informant who had been promised confidentiality. Defendant has identified Socrider as the individual from whom the FBI obtained the infor-

mation. To permit exemption, on defendant's contention that the confidentiality promised Socrider somehow filtered down to his law firm or to the alleged original informant, would result in interpretation clearly far beyond the language of 552a(k)(5). Exemptions from disclosure are to be construed narrowly and ambiguities resolved in favor of disclosure. *Hawkes* v. *Internal Revenue Service,* 467 F.2d 787, 795 (6th Cir. 1972); *Sears, Roebuck & Co.* v. *General Services Adm'n,* 384 F.Supp. 996, 1001 (D. DC. 1974).

Defendant's argument that the policy behind disclosure is not involved in this case is highly tenuous. Defendant states that no action other than transfer was taken against plaintiff. Yet, exhibits attached to plaintiff's brief show that, as a result of the investigation to which the information pertains, plaintiff was suspended without pay for five days and placed on probation from August, 1976, to December, 1976.

Accordingly, IT IS ORDERED:

That defendant's motion for summary judgment be and the same hereby is denied, and

That judgment directing disclosure of the requested information for plaintiff be and the same is hereby granted.

Counsel for plaintiff is directed to prepare final order of judgment in accordance herewith.

The Clerk of the Court is directed to mail a copy hereof to counsel of record.

[APPENDIX]

[Caption Omitted in Printing]

Filed June 20, 1980

Luther B. Eubanks, United States District Judge

FINAL ORDER OF JUDGMENT

This matter came on for trial before the Court, Honorable Luther B. Eubanks, District Judge, presiding. The Court having heard and considered the evidence and briefs of law submitted by both parties and good cause appearing therefore,

IT IS ORDERED, ADJUDGED, AND DECREED that the Defendant is enjoined from withholding the personnel records of Plaintiff and that Defendant furnish to Plaintiff, Plaintiff's personnel records for review and copying.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant pay Plaintiff's attorney, Duane Miller, a reasonable attorney fee in the amount of $1,200.00, and Defendant reimburse Plaintiff $21.00 for costs of this litigation.